STATE OF MICHIGAN

COURT OF APPEALS

WASHINGTON MUTUAL BANK,

Plaintiff-Appellant,

v

JOSEPH SMITH,

Defendant-Appellee.

UNPUBLISHED
June 1, 2006

No. 266470
Oakland Circuit Court
LC No. 05-064194-CZ

Before: Schuette, P.J., and Bandstra and Cooper, JJ.

PER CURIAM.

In this quiet title action, plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendant. We reverse and remand for proceedings consistent with this opinion.

This case involves a mortgage priority dispute regarding real property purchased by Donald B. and Janet A. Zavistowski. The Zavistowskis obtained a first mortgage from Colonial Mortgage Corporation and obtained a second mortgage from Madison National Bank, now known as Peoples State Bank. The Zavistowskis refinanced the property and obtained a third mortgage from Option One Mortgage Corporation, the proceeds of which were used to pay off the loan secured by the first mortgage from Colonial. The Option One mortgage was executed on condition of a subordination agreement by which Peoples purportedly subordinated their mortgage to that of Option One. However, the subordination agreement mistakenly designated Republic Mortgage Corporation, the mortgage broker, as the mortgagee attaining priority. The Zavistowskis defaulted on the mortgages and after the expiration of the redemption period following the foreclosure proceedings, plaintiff, the successor to the mortgage originally held by Option One, brought suit against defendant, the successor to the mortgage originally held by Peoples, to quiet title to the property.

Defendant moved for summary disposition under MCR 2.116(C)(10), arguing that based on the ineffective subordination agreement, there was no genuine issue of material fact that his mortgage had priority. Defendant further argued that as a mere volunteer, equitable subrogation was unavailable to plaintiff. Plaintiff moved for summary disposition under MCR 2.116(I), arguing that it was entitled to summary disposition because defendant had actual and/or constructive notice of plaintiff's priority position. Plaintiff also argued that the trial court, as a matter of equity, should read the ambiguous subordination agreement to find it in first priority

based on the parties' intent. Plaintiff argued in the alternative that it was entitled to equitable subrogation or reformation of the subordination agreement.

The trial court found that the subordination agreement was ineffective to subordinate plaintiff's mortgage to defendant's mortgage due to the defects contained in the instrument. The trial court also found that plaintiff, as an acknowledged volunteer, could not invoke equitable subrogation to place its mortgage in first priority. Finally, the trial court found that reformation was not an available option. The trial court granted summary disposition in favor of defendant and plaintiff now appeals that ruling.

We review de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(10), considering the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion. *Rose v Nat'l Auction Group*, 466 Mich 453, 461; 646 NW2d 455 (2002). Summary disposition is appropriately granted if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id*.

Plaintiff first argues that the trial court erred in granting summary disposition in favor of defendant on the basis that the subordination agreement was ineffective, because defendant had actual and/or constructive notice of the priority status of his mortgage vis-à-vis plaintiff's mortgage and failed to make reasonable inquiry into the effect of the subordination agreement. Defendant argues that plaintiff has abandoned its argument regarding the effectiveness of the subordination agreement because it fails to address the defects of the instrument on appeal. However, although the trial court did not elaborate or provide specific details about how it found the subordination agreement to be ineffective, the nature of mortgages and the recording requirements implicate notice.

"Notice is whatever is sufficient to direct attention of the purchaser of realty to prior rights or equities of a third party and to enable him to ascertain their nature by inquiry. Notice need only be of the possibility of the rights of another, not positive knowledge of those rights. Notice must be of such facts that would lead any honest man, using ordinary caution, to make further inquiries in the possible rights of another in the property." *Royce v Duthler*, 209 Mich App 682, 690; 531 NW2d 817 (1995), quoting *Schepke v Dep't of Natural Resources*, 186 Mich App 532, 535; 464 NW2d 713 (1990).

In support of his motion for summary disposition, defendant provided his affidavit; a title search of the property; the assignment and hold harmless agreement between himself and Peoples; a letter from his attorney advising plaintiff that its mortgage was subordinate to defendant's mortgage; a fax cover page from his attorney depicting that the subordination agreement to Republic was recorded in the same liber and on a page consecutive to the Option One mortgage; various correspondence between his attorney and the vice president/corporate counsel for Peoples concerning the priority status of the mortgage; and a grantor/grantee index search disclosing that a subordination agreement to Republic existed, without reference to an underlying mortgage. This documentary evidence indicated that defendant was business partners with Donald Zavistowski and that their homes were mortgaged to secure a loan from Peoples; that when the Zavistowskis' loans went into default, a loan officer suggested that defendant purchase and take assignment of the Peoples loan, which he assured defendant was first in priority; that when he received the title search, he met with the vice president/corporate counsel

for Peoples; that upon inquiry regarding the subordination agreement, he was told that it was either a mistake and should not have been recorded or represented a loan that never closed, and that the Peoples mortgage was in first priority; that he personally handled the transaction and negotiations to purchase the Peoples mortgage, only involving his attorney with the final paperwork; and that he received nothing regarding Zavistowskis' bankruptcy that put him on notice regarding the alleged lack of first priority of the Peoples mortgage.

In response to defendant's motion for summary disposition, plaintiff came forward with evidence that defendant had actual or constructive knowledge that his mortgage was not in first priority. Specifically, plaintiff provided the articles of incorporation showing that defendant and Zavistowski had been business partners for ten years; the Zavistowskis' bankruptcy plan and schedules, allegedly indicating that plaintiff's mortgage had first priority; defendant's deposition testimony wherein he admitted to receiving the Zavistowskis' bankruptcy schedules and plan and indicated that his attorney reviewed the bankruptcy documentation; a title search of the property indicating that the Peoples mortgage was subject to a subordination agreement and had been assigned to defendant, that the Option One mortgage had been transferred to plaintiff, and that the mortgages had been recorded in the same liber and on consecutive pages; a tract index search indicating that the Option One and Peoples mortgages had been recorded on the same date, in the same liber, and on consecutive pages; and a fax cover page from defendant's attorney depicting that the subordination agreement to Republic was recorded in the same liber and on a page consecutive to the Option One mortgage.

Based on the evidence proffered by plaintiff, we find that genuine issues of material fact exist concerning whether defendant had actual or constructive knowledge of the priority status of his mortgage, and whether defendant's inquiry into the priority status of his mortgage was reasonable in light of his knowledge of the existence of the subordination agreement. "Reasonableness is generally a question of fact to be determined by the trier of fact," *Payne v Farm Bureau Ins*, 263 Mich App 521, 523 n 1; 688 NW2d 327 (2004). Because reasonable minds could differ on the basis of the evidence presented, the trial court's grant of summary disposition in favor of defendant was inappropriate. *Jackson v Saginaw Co*, 458 Mich 141, 146; 580 NW2d 870 (1998). Although we reverse and remand on this basis, we will address plaintiff's remaining issues on appeal to resolve questions which may arise again on remand. See *Detroit Free Press, Inc v Family Independence Agency*, 258 Mich App 544, 562; 672 NW2d 513 (2003).

Plaintiff argues that the trial court erred in finding that plaintiff could not invoke the doctrine of equitable subrogation because it was a volunteer. We review de novo equitable actions to quiet title. *Burkhardt v Bailey*, 260 Mich App 636, 646; 680 NW2d 453 (2004). Subrogation is not available to a mere volunteer, *Washington Mut Bank, FA v ShoreBank Corp*, 267 Mich App 111, 114; 703 NW2d 486 (2005), and equitable subrogation has never been "intended for the protection of sophisticated financial institutions that can choose the terms of their credit agreements." *Deutsche Bank Trust Co Americas v Spot Realty, Inc*, 269 Mich App 607, 614; ___ NW2d ___ (2005).

When the Zavistowskis refinanced the property, the proceeds from the Option One mortgage were used to pay off the loan secured by the initial mortgage given by Colonial Mortgage Corporation. However, the "doctrine of equitable subrogation does not allow a new mortgagee to take the priority of the older mortgagee merely because the proceeds of the new

mortgage were used to pay off the indebtedness secured by the old mortgage." *Washington Mut Bank, supra* at 119-120. Option One was under no legal duty to undertake the refinancing. Option One voluntarily entered into the transaction, and plaintiff could only succeed to the position of a mere volunteer. Indeed, there is no precedent "to support the general proposition that a new mortgage, granted as part of a generic refinancing transaction, can take the priority of the original mortgage, which is being paid off, giving it priority over intervening liens." *Washington Mut Bank, supra* at 128. While plaintiff argues that it was not a volunteer because it was bound by the subordination agreement, this argument is misplaced because the subordination agreement did not create a duty for Option One to undertake the refinancing mortgage. Accordingly, the trial court correctly determined that plaintiff may not avail itself of the doctrine of equitable subrogation because it is a volunteer.

Plaintiff next argues that the trial court erred in finding that reformation was not an available option.[1] We review de novo the trial court's decision to grant or deny equitable relief. *Olsen v Porter*, 213 Mich App 25, 28; 539 NW2d 523 (1995). "Courts are required to proceed with utmost caution in exercising jurisdiction to reform written instruments." *Theophelis v Lansing Gen Hosp*, 430 Mich 473, 492; 424 NW2d 478 (1988). "Courts will reform an instrument to reflect the parties' actual intent where there is clear evidence that both parties reached an agreement, but as the result of mutual mistake . . . the instrument does not express the true intent of the parties." *Mate v Wolverine Mut Ins Co*, 233 Mich App 14, 24; 592 NW2d 379 (1998).

The subordination agreement between Peoples and Option One was prepared in conjunction with the Option One refinancing mortgage. The errors in the subordination agreement include twice misidentifying the mortgagee, misstatement of the mortgage amount, omission of the mortgagee's address, and omission of the liber and page references for the subordinating mortgage. Option One and Peoples intended to subordinate defendant's mortgage with the purpose and intent that Option One would pay off the Colonial mortgage with the proceeds. Due to the errors contained in and omissions from the agreement, it is evident that the instrument does not reflect the true intent of the parties, i.e., to subordinate the Peoples mortgage.

"Persons standing in privity with the original party to a[n] . . . instrument may obtain reformation under some circumstances." Michigan Pleading and Practice, § 85.62, p 130. See also *Kowatch v Darnell*, 354 Mich 197, 201; 92 NW2d 342 (1958); *Nisbett v Milner*, 159 Mich 337, 343; 124 NW 22 (1909). However, "[n]egligence of the plaintiff in executing an instrument may bar reformation." Michigan Pleading and Practice, § 85.61, p 129. See also *Troff v Boeve*, 354 Mich 593; 93 NW2d 311 (1958). Here, Option One accepted the subordination agreement which, among other errors, twice misidentified Republic as the mortgagee; therefore, Option One, and plaintiff as successor to the mortgage, are precluded by negligence from reformation of

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[1] This issue was properly before the trial court: although plaintiff did not raise this issue in its complaint, plaintiff raised it in its reply to defendant's motion for summary disposition and the trial court addressed it in its opinion and order. Therefore, the issue was treated as if it had been raised in the pleadings. MCR 2.118(C)(1); *Reid v State of Michigan*, 239 Mich App 621, 630; 609 NW2d 215 (2000).

the instrument. Accordingly, the trial court correctly determined that reformation was not available to plaintiff.

We reverse and vacate the trial court's order granting summary disposition in favor of defendant and remand for trial. We do not retain jurisdiction.

/s/ Bill Schuette
/s/ Richard A. Bandstra
/s/ Jessica R. Cooper